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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

February Term, 1991

Orville Patterson, Jr., Petitioner

vs.

State of Maine, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME JUDICIAL COURT

OF THE STATE OF MAINE

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QUESTION PRESENTED

Does the Fourth Amendment to the Constitution of the United States, as applied to the states by the Fourteenth Amendment to the Constitution of the United States require that police roadblocks established to make vehicle safety checks be operated in accordance with criteria previously established by politically accountable officials and systematically applied?

TABLE OF CONTENTS

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE STATE OF MAINE

QUESTION PRESENTED..... i

OPINION BELOW..... 1

JURISDICTION..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE WRIT..... 9

CONFLICTS..... 10

ERROR BELOW..... 14

IMPORTANCE..... 17

CONCLUSION..... 21

INDEX TO APPENDICES

Appendix A — State of Maine v. Orville Patterson, Jr. _____A.2d_____ (1990) 1990 ME, Lexis 287

Appendix B — Superior Court Decision

Appendix C — Amendments IV and XIV Sec. 1 to Constitution of United States

TABLE OF AUTHORITIES CITED

CASES

State of Maine v. Orville Patterson, Jr., ___A.2d ___ (Me, 1990) 1990 ME LEXIS 287..... 1

Brown v. Texas, 443 U.S. 47 (1979).....8, 9, 11, 14, 15, 18

Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990)...8, 11, 12

Delaware v. Prouse, 440 U.S. 648 (1979).....8, 10, 12

United States v. Martinez-Fuerte, et al. 428 U.S. 543 (1976).....11, 18

United States v. Ortez, 442 U.S. 891..... 11

Almeida Sanchez v. United States, 413 U.S. 266 (1973)..... 11

State v. Deskins, 673 P.2d 1174 (Kan. 1983).....11, 13

State v. Olgaard, 248 NW2d, 392
(S.D. 1976)..... 11
State v. Trumble, 483 NE2d 1102
(Mass, 1985)..... 11
Ingersoll v. Palmer 743 P 2d 1299,
43 Cal. 3d 1321 (1987)..... 11
State v. Martin 496 A 2d 442,
145 Vt. 562 (1985)..... 11
State v. Koppel 499 A.2d 977,
127, NH 286 (1985).....15, 19

STATUTES

Title 28, Sec. 1254 (3)..... 2
United States Constitution
Fourth Amendment..... 2
Fourteenth Amendment, Sec. 1..... 2

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PETITION FOR WRIT OF CERTIORARI TO THE

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OF THE STATE OF MAINE

Petitioner, Orville Patterson, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Judicial Court of the State of Maine refusing to suppress from evidence the results of certain questioning and police observations of the Petitioner which were obtained at a roadblock type stop of Petitioner's vehicle conducted without probable cause or pursuant to any criteria previously established by politically accountable officials and systematically applied.

OPINION BELOW

The opinion of the Maine Supreme Judicial Court is reported as State of Maine. v Orville Patterson, Jr., _____ A.2d _____ (Me 1990) 1990 ME LEXIS 287 and appears in Appendix A to this Petition. The unpublished Order of the Superior Court

for Penobscot County, Maine appears in Appendix B to the Petition.

JURISDICTION

The Opinion of the Maine Supreme Judicial Court was rendered on November 28, 1990. Jurisdiction of the Supreme Court of the United States is invoked pursuant to Title 28 U.S.C., Sec. 1575(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THE CASE

The Fourth Amendment and Fourteenth Amendment to the United States Constitution are set forth in Appendix C.

STATEMENT OF THE CASE

On the afternoon of September 30, 1989, a Maine State Trooper with four years experience decided, on his own, to operate a roadblock to conduct a vehicle

safety check on a rural stretch of road in Eddington, Maine. The area he chose had what the Trooper characterized as "...kind of light to medium traffic." Superior Court hearing transcript P. 7, Lines 15 and 16. He further stated that the area was not known for a high incidence of vehicle safety violations. In operating his roadblock, the Trooper testified that there were no standards established by his superior officers, either written or oral; that he had not discussed his intention to operate the roadblock, its location or the procedures he intended to follow with any superior officers; that he had received no instructions from his superiors as to how to operate such a roadblock and that it was essentially an unfettered exercise of his own discretion. The following exchange between defense counsel and the Trooper

during the Superior Court Suppression Hearing is instructive:

> Defense Counsel: Okay, alright. Officer, with regard to this roadcheck, you indicated that all the policies surrounding this roadcheck were at your sole discretion; in otherwords, how you were going to operate it was left up to you?
>
> The Witness: Correct, on a safety check it would be.

Superior Court Hearing Transcript Page 17, Lines 1-5.

While operating his roadcheck, the Trooper noticed the Petitioner's truck come into view and stop. The passenger got out of the vehicle and went into the woods by the side of the road. When he returned, he got in on the drivers side,

the Petitioner having slid over to the passenger's seat. The truck then drove up to the roadblock. The Trooper waved several vehicles through the roadblock, specifically to be able to stop the Petitioner's vehicle. He then demanded operator's licenses from both Petitioner and the driver. When the Trooper discovered that the Petitioner's license was suspended, he arrested him.

On November 6, 1989, Petitioner was indicted by the Penobscot County Grand Jury for violation of Maine's habitual motor vehicle offender statute, a Class C felony. On November 17, 1989, Petitioner entered a plea of not guilty. After receipt of discovery from the State, Petitioner moved to suppress the results of the seizure of his person at the Trooper's roadblock. It was in the motion to suppress, filed with the Penobscot

County Superior Court on December 21, 1989, that Petitioner first raised the issue of violation of his rights under the Fourth Amendment to the United States Constitution.

The motion was heard in testimonial form by an active retired Justice of the Maine Superior Court on January 22, 1990. The motion was denied on the same day. On March 7, 1990, Petitioner entered a conditional plea of guilty, reserving the right to appeal all issues raised in his Motion to Suppress and its denial by the Superior Court Justice. On the same day, the Petitioner was sentenced to sixty (60) days in the Penobscot County Jail. A stay of execution was issued pending appeal to the Maine Supreme Judicial Court. A Notice of Appeal to that Court was filed on March 9, 1990.

Oral argument before the Maine Supreme Judicial Court was held September 19, 1990. Petitioner argued that the Trooper's operation of the roadblock violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution, since the roadblock was conducted in the sole and absolute discretion of the arresting officer. Petitioner further asserted that the evidence obtained by the officer after the stop was seized pursuant to the unlawful roadblock and should have been suppressed.

The Maine Supreme Judicial Court, in a 4 to 1 decision, upheld the decision of the Court below, finding in essence that the officer's discretion was "minimal," and that the fact this type of roadblock had been conducted by the arresting officer before, as well as by other troopers in other parts of the State,

demonstrated its reasonableness. The Court further held that the "known procedure for conducting these checks worked as a limit on Officer Curtis's discretion." Having found the roadblock constitutional, the Court held that the stop of Petitioner's vehicle and the Trooper's request for Petitioner's license, in light of the officer's observations, was lawful and justified. In reaching this conclusion, the Court relied upon, inter alia, Brown V. Texas, 443 U.S. 47 (1979), Michigan Dept. of State Police v. Sitz 110 S. Ct. 2481 (1990) and Delaware v. Prouse, 440 U.S. 648 (1979).

Justice Glassman dissented, pointing out that absent the roadblock, the Trooper could not have stopped Petitioner's vehicle based on his observations as presented at the Suppression Hearing. She went on to point

out that, based on the record below, there was no indication, beyond some "ill defined past practices," that the Trooper's "discretion was limited in any actual or quantifiable manner." She apparently felt that the absence of any previously specified neutral criteria made the application of the Brown v. Texas, supra, balancing test inappropriate, since the same was premised on the Petitioner's right to be free from arbitrary interference by the police. She found that the actions of the Trooper did violate Petitioner's rights under the Fourth and Fourteenth Amendments to the United States Constitution and would have vacated the judgment below.

REASONS FOR GRANTING THE WRIT

There are three reasons for granting the Writ. First, the decision of

the Maine Supreme Judicial Court is in conflict with previous decisions of the Supreme Court of the United States and those of a number of the highest courts of the several states. Second, the decision of the Maine Supreme Judicial Court is quite simply wrong. Third, the question presented will affect not only the citizens of the State of Maine, and the citizens of other states who drive in Maine, but indeed every operator and passenger in every motor vehicle in the United States, should any other state courts be tempted to follow this lead.

CONFLICTS

The decision of the Maine Supreme Judicial Court is in direct conflict with the holding of the Supreme Court of the United States in Delaware v. Prouse, supra, while it conflicts, in principle, with such

cases as United States v. Martinez-Fuerte, et al, 428 U.S. 543 (1976), United States v. Ortiz, 422 U.S. 891 (1975) and Almeida Sanchez v. United States, 413 U.S. 266 (1973) and Michigan Dept. of State Police, et al v. Sitz, et al., 110 S. Ct. 2481. The decision is also in conflict with the holdings of a number of state appellate court decisions, for example, State v. Deskins, 673 P. 2d 1174 (Kan. 1983), State v. Olgaard 248 N.W. 2d 392 (SD. 1976), State v. Trumble, 483 N.E. 2d 1102 (Mass. 1985), Ingersoll v. Palmer, 743 P 2d 1299, 43 Cal. 3d 1321 (1987) and State v. Martin, 496 A2d 442, 145 Vt. 562 (1985).

In the Supreme Court of the United States cases cited, the Court applied the test first set out in Brown v. Texas, supra, in determining the reasonableness of the search involved. One of the primary elements of that test is, in the absence of

an articulable suspicion of criminal activity, the existence of a substantial and objective standard or rule pursuant to previously specified neutral criteria against which the actions of the officer in the field may be measured. Delaware v. Prouse, supra at 661. The necessity of previously established standards or rules was recognized in Sitz, supra at 2487 when Chief Justice Rehnquist, having earlier discussed the guidelines established by the Michigan Department of State Police, pointed out how it was the position of politically accountable officials to establish procedures to deal with serious public concerns.

The State Court decisions cited all deal with some manner of police roadblock where vehicles were stopped and the operators and occupants seized for Fourth Amendment purposes. Whether the courts

found the roadblocks constitutional or not, each required a previously established set of guidelines, established at least by superior officers, if not by state officials, which would effectively limit the discretion of the officers in the field. The standards set forth in State v. Deskins, supra, in one form or another, have been followed in a number of states, even Maine. It is true that not all of the standards will necessarily apply to every situation but as the Deskins court points out, unbridled discretion of the officer in the field will always render the roadblock unconstitutional. It seems relatively certain that the state courts which decided the foregoing cases would have decided Petitioner's case, not as it was, but as Justice Glassman's dissent proposed.

ERROR BELOW

The Maine Supreme Judicial Court was clearly wrong in deciding Petitioner's appeal as it did. While the discussion of Federal precedents in the majority opinion is extensive, and the court paid lip service to the test set forth in Brown, it ignored what the Brown court called the central concern in balancing the competing considerations generated in a Fourth Amendment seizure. That central concern, as set forth in Brown and followed in virtually every other case decided since by the Supreme Court of the United States and certainly by an overwhelming majority of state supreme courts, requires that before an individual's reasonable expection of privacy can be invaded, it must first be established that the police seizure is based on specific objective facts including that it is in society's interest that the

individual be seized. Here, not even the Maine Court majority would say, absent a constitutional roadblock, that the actions of Petitioner gave rise to such facts. In the event that there are no such facts, such as in roadblock situations, the seizure must be carried out pursuant to a plan embodying explicit neutral limitations on the conduct of individual officers. Brown v. Texas, supra. Without those prerequisites, the people could fall victim to arbitrary and capricious police seizure at every turn.

In the area of police roadblocks, Mr. Justice Souter stated, as a member of the Supreme Court of New Hampshire and dissenting in State v. Koppel, 499 A. 2d 977, 127 N.H. 286 (1985), "Absent an articulable basis for suspecting illegality, unbridled police discretion to stop a car is antithetical to the driver's

protected interests. A limitation on such discretion in the form of criteria to be systematically applied should therefore be a required feature of any roadblock procedure that could survive constitutional scrutiny."

Here, there was no plan at all. It is true the Maine Court stated that this particular officer had conducted these types of roadblocks for four years and that other officers in other parts of the state had conducted similar operations. The Court calls this a state policy. The simple fact of the matter is that there is no state policy, written or oral, beyond, apparently, allowing these roadblocks in the unfettered discretion of the officer in the field. In fact, there is no state policy expressly allowing even that. In Maine, roadblocks are apparently being operated pursuant to inexplicit, subjective

and unlimited plans, established and conducted on an ad hoc basis at the sole discretion of very junior field officers. Though it protests otherwise, the Maine court majority has elevated this unfortunate "historic" practice to the level of a constitutionally permitted interference with those individual liberties guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. Such a departure from previous decisions should not be allowed to stand.

IMPORTANCE

The import of the decision of the Maine Court on Petitioner's case extends far beyond him individually. Now, every motorist in Maine is subject to seizure by the police if four pre-conditions are met. First, apparently, the officer's car is

stopped. Second, a state interest is advanced. Third, the motorist isn't stopped too long. Fourth, other police officers have done the same thing in the past. Nothing else is required.

The decision could take on national significance, however, when the purpose of this roadblock is considered. This safety check roadblock, had it been conducted in accordance with the Brown requirement of an explicit neutral plan, would have been the very type of stop Mr. Justice Powell referred to in Martinez-Fuerte, supra at Footnote 14. While noting that such laws were not before it, the Court pointed out that such stops were accepted by motorists "as incident to highway use." It is to be presumed that the Brown considerations apply to these stops as well as to other types of roadblocks. Perhaps the existence of "laws" allowing such stops meets the

requirements of the Fourth Amendment. Maine has no such laws, but the decision could be used in conjunction with Mr. Justice Powell's footnote, for the proposition that such "administrative" stops do not require the same quantum of Fourth Amendment protection as other types of roadblocks, Mr. Justice Souter in Koppel to the contrary not withstanding. Such a result could lead to an erosion of the Fourth Amendment which would be as unfortunate as it would be unnecessary. It is no intolerable burden for Maine or any other state to establish uniform neutral guidelines to govern police procedure when the rights of the people under the Fourth Amendment are involved.

The Court should grant certiorari here to resolve the conflict between the decision of the Maine Supreme Judicial Court and those decisions of both the

Supreme Court of the United States and of the highest courts of a number of the several states, because the Maine Supreme Court has committed error and to explicitly rule that all police roadblocks established for such administrative purposes as safety and license checks, be operated in accordance with neutral criteria previously established by politically accountable officials and systematically applied.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in this matter.

Dated: 2/22/91

Respectfully submitted,

John D. Clifford, IV, Esq.

J. Michael Huston, Esq.

Attorneys for Petitioner

APPENDIX A

STATE OF MAINE

v.

ORVILLE PATTERSON, JR.

Decided November 28, 1990

_____ A2d _____ (1990) 1990 ME Lexis 287

Before McKUSICK, C.J. and WATHEN, GLASSMAN, COLLINS and BRODY, JJ. CLIFFORD, J. and ROBERTS, J. did not sit

McKUSICK, C.J.

The Superior Court (Penobscot County, (Smith, J.) entered judgment on

defendant Orville Patterson's conditional plea of guilty to the charge of operating a motor vehicle while an habitual offender, 29 M.R.S.A. Sec. 2298 (Class C) (Supp. 1989). On appeal, defendant challenges the denial by the Superior Court (Browne, A.R.J.) of his motion to suppress evidence. Defendant contends that a state police officer stopped him at an illegal roadblock that tained all of the evidence the officer obtained after the stop. We affirm the court's finding that the stop did not violate defendant's right, secured by the Fourth and Fourteenth Amendments of the United States Constitution and article I, section 5, of the Maine Constitution, to be free of an unreasonable seizure.

In the early afternoon of Saturday, September 30, 1989, on Route 178 in Eddington, Maine State Police Officer Barry Curtis conducted a roadblock for the purpose of checking vehicle safety. The

uniformed officer parked his plainly marked cruiser in the middle of the road and stopped all cars coming from both directions. At approximately 1:50 p.m., the officer saw a pickup truck stop and change drivers about 100 yards from the roadblock. The driver, defendant Orville Patterson, slid over to the passenger seat, while his passenger, Harold Spann, got out and walked into the trees along the side of the road. When Spann returned to the truck, he got into the driver's seat. The officer stopped the truck when it came up to his cruiser. He asked both men for licenses, but defendant refused to surrender one, saying that he did not have to because he was not driving. The officer put defendant in the cruiser and ran a license check. On learning that defendant's license had been suspended, Officer Curtis arrested him.

We first addressed the constitutionality of a police roadblock in State v. Cloukey, 486 A.2d 143 (Me. 1985), which involved as does this case a roadblock designed to check traffic safety features. There we distinguished the fixed roadblock from the roving stop held unconstitutional by the United States Supreme Court in Delaware v. Prouse, 440 U.S. 648 (1979). In Cloukey, 486 A.2d at 145, our analysis "beg[an] with the fundamental question whether the action of the police officers in conducting the roadblock was 'reasonable' under the Fourth Amendment." In finding the safety check roadblock at issue in Cloukey reasonable, we adopted the test set forth in Delaware v. Prouse:

> "[T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests

against its promotion of legitimate governmental interests."

State v. Cloukey, 486 A.2d at 145 (quoting Delaware v. Prouse, 440 U.S. at 654). All of our subsequent roadblock cases have continued to apply a flexible balancing test between the magnitude of the intrusion and the state interest advanced. See State v. Sherburne, 571 A.2d 1181, 1184 (Me. 1990) (fish and wildlife roadblock); State v. McMahon, 557 A.2d 1324, 1325 (Me. 1989) (vehicle safety and OUI roadblock); State v. Leighton, 551 A.2d 116, 117 (Me. 1988) (OUI roadblock).

We are confirmed in our approach by the United Staets Supreme Court's decision within the year in Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481 (1990), which affirmed the constitutionality of "sobriety checkpoints" or OUI roadblocks conducted by Michigan's state police. Sitz, id. at 2485, applied the balancing test developed in Brown v. Texas, 443

U.S. 47, 50-51 (1979), that

> involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.

The Brown test differs from the two-pronged test in Delaware v. Prouse, 440 U.S. at 654, that we have traditionally applied to roadblocks, only by considering the pront of "promotion of legitimate governmental interests in two parts rather than one. For ease of analysis, Brown looks at the "gravity" of the public interst as a measure of its legitimacy and at the extent of the seizure "advances" the interest as a measure of its promotion. Brown v. Texas, 443 U.S. at 51. Consequently, on our review of the Superior Court's ruling, we will apply the three-pronged balancing test of Brown to the circumstances of the safety

check roadblock here at issue. The checklist of thirteen items quoted in Cloukey, 486 A.2d at 146, from State v. Deskins, 234 Kan. 529, 541, 673 P.2d 1174, 1185 (1983), is nothing more than an identification of factual circumstances that may in varying degrees have bearing on making that balance in a particular case. Consideration of all the circumstances of the roadblock involved in this case persuades us that it passes constitutional muster.

In weighing the gravity of the public concern served by a roadblock and the degree to which it advances the public interst, we examine "the societal interest in dealnig with the issue effectively, the availability of less intrusive means to accomplish the objective and the efficacy of the method chosen." State v. Sherburne, 571 A.2d at 1184. Our cases have consistently emphasized that the State's

vital interest in the health, safety, and welfare of its citizens justifies roadblocks designed to enforce motor vehicle safety laws and to prevent traffic accidents. See id. at 1188. The public is best served by a regime that deters drivers from traveling in unsafe vehicles and identifies safety defects before vehicles are involved in accidents. See State v. Cloukey, 486 A.2d at 146-47. We have never required the State to show conclusively that the means the police choose to check for unsafe vehicles is the best of all possible choices. See State v. McMahon, 557 A.2d at 1325-26. Because the officer's goal in setting up the roadblock in the case at bar was only to make a visual check of vehicles for safety violations and not to check drivers licenses and registrations, the method chosen was speedy and at the same time effective. The officer conducted his check during the daytime, on a well-lit,

flat stretch of road with visibility of 100 to 150 yards in each direction. HE stopped vehicles and checked their headlights, plate lights, tires, and inspection and registration stickers. The officer did not request licenses and registrations except in those instances where the vehicle had an expired sticker. We cannot think of a less intrusive and more effective method of checking for all of these violations at the same time.

Defendant has not demonstrated that the minimal discretion exercised by this officer in conducting a roadblock at which drivers were not asked to show their licenses or registrations was a severe interference with the motorists' liberty interest that automatically tipped the balance against its reasonableness. The officer's safety check took only 1 1/2 to 2 minutes. If the line grew to seven or eight vehicles, he waved all of them through. If he found a vehicle that had a

faulty headlight or needed air in its tires, the officer merely warned the driver of the problem and did not issue a citation. The officer also testified that hwe had conducted this kind of safety roadblock for the four years he had been on the force and thtat he knew that other state police officers conducted the same type of roadblock in other parts of the state. Without endorsing the proposition that the historical fact of an established police practice always demonstrates its reasonableness, we cannot find that the state police policy of allowing individual officers to conduct this sort of minimally intrusive safety check is unreasonable. The known procedure for conducting these checks worked as a limit on Officer Curtis's discretion. In these circumstances the absence of supervisory personnel in the planning of this specific safety check does not render the limited operation unreasonable. See State v.

Cloukey, 486 A.2d at 146.

The court's "determination that the roadblock was conducted reasonably was based on competent evidence and does not amount to clear error." State v. Sherburne, 571 A.2d at 1185 (citing State v. Reeves, 499 A.2d 130, 132 (Me. 1985). Based on the uncontradicted testimony of Officer Curtis, the court was justified in finding that this safety check roadblock effectively promoted the important public interest of highway safety and outweighed the minimal intrusion on individual liberty. See State v. Cloukey, 486 A.2d at 147.

Since the safety check roadblock was constitutionally reasonable, there is no question that the officer was justified in stopping defendant's truck and asking him for his license. The officer reasonably inferred from the switch in drivers within sight of the roadblock that the original driver was either intoxicated

or under suspension and did not want to risk being caught by the police he saw ahead. In the circumstances, the change of drivers objectively suggests defendant's consciousness of guilt. Defendant's action in relinquishing the wheel in advance of a legal roadblock gave rise to a reasonable, articulable suspicion of criminal conduct that amply justified the invesitgative stop. See State v. Griffin, 459 A.2d 1086, 1090 (Me. 1983).

The entry is:

Judgment affirmed.

GLASSMAN, J., dissenting

Because I conclude that the stop in the instant case was an unreasonable search and seizure, both under federal constitutional law and this court's precedents, I must respectfully dissent. The constitutional validity of the roadblock is the pivotal issue in this case. Absent some reasonable, articulable suspicion or neutral, objective standard, Curtis could not have stopped Patterson. See Terry V. Ohio, 392 U.S. 1 (1968); State v. Pinkham, 563 A.2d 318 (Me. 1989). If removed from the context of the roadblock, Patterson's behavior, as described by Curtis at the motion hearing, could not rise to the level of the furtive or suspicious conduct necessary for a Terry stop. Cf. State v. Griffin, 459 A.2d 1086, 1090 (Me. 1983). According to Curtis's testimony, he observed a car come to a stop at the side of the road, the passenger leave the vehicle and walk into

the woods, the driver slide over into the passenger seat, and the passenger return to the driver's seat and drive up to the roadblock. These acts were allegedly undertaken as a direct result of Patterson's intent to evade detection by the police at the upcoming roadblock. Had Curtis stopped the vehicle because he had observed the same conduct while traveling the road or while parked by the roadside, this court would presumably find that the officer acted without reasonable suspicion for such a "roving stop" because the driver's acations were neither a violation of the law nor did they suggest underlying criminal activity. See State v. Pinkham, 563 A.2d at 320. For this reason, the reasonableness of the suspicions articulated by Curtis before the trial court depends directly on the reasonableness of the roadblock. Because a police officer cannot unreasonably create a context to justify his own

suspicions regarding an otherwise innocuous act, both the roadblock and the subsequent Terry stop were constitutionally unfounded.

Focusing on the validity of the roadblock, the court's opinion properly attempts to balance the relevant state interest against the magnitude of the particular intrusion on the reasonable privacy expectations of those drivers subjected to the roadblock. We have previously recognized that the State has a vital interest in the enforcement of its highway safety laws. See, e.g., State v. Cloukey, 486 A.2d 143, 146 (Me. 1985). 1

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1 In employing this balancing test, however, some state interests may be more compelling than others. For example, the state interest in the prevention of drunk driving, which was the linchpin of the recent decision in Michigan Dep't of State Police v.

Where the court seriously departs from our previous decisions is in its analysis of the corresponding "reasonableness" of the intrusion posed by the roadblock. Recognizing that reasonableness must be measured against an "objective standard," Delaware v. Prouse, 440 U.S. 648, 654 (1979), the court asserts that the thirteen factors enumerated in are merely factual

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Sitz, 110 S. Ct. 2481 (1990) (upholding trial court's finding that state interest was "grave and legitimate"), is arguably greater than the state's interest in inspecting automobiles for safety violations. This fact becomes significant when a court is forced to measure the reasonableness of the stop on the other side of the balance, since a less compelling state interest may necessitate a greater showing of "reasonable" police action. See id. at 2485-86.

circumstances to be considered, but that the absence of one or more of these factors will not necessarily invalidate the roadblock. See also State v. Leighton, 551, A.2d 116, 119 (Me. 1988). While this may be an accurate statement of the Cloukey test, the amount of discretion allowed the

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2 The Cloukey court listed the following factors as an example of the type of objective standard attempted by courts in other jurisdictions:

> (1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to public at large; (6) advance warning to individual approaching motorist; (7) maintenance of public

safety; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

State v. Cloukey, 486 A.2d at 146 (citing State v. Denkins, 234 Kan. 529, 673 P.2d 1174 (1983)). In the instant case, Curtis's roadblock arguably runs afould of factors 1, 4, 5, 6, 7 and 10.

police officer in the field is the crucial underlying criterion behind the determination of reasonableness. See Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990). The factors listed in the Cloukey decision lose their significance if left to the unsupervised whim of one police officer in the field. Cf. Delaware v. Prouse, 440 U.S. 648, 655 (1979); Camara v. Municipal Court, 387 U.S. 523, 532 (1967). Indeed, this is the first case before this court where there is no indication that the police officer's discretion was limited in any actual or quantifiable manner. Officer Curtis testified that he did not follow a written or oral department policy and that no superivosr pre-approved or monitored this roadblock. Instead, Curtis could only point to some ill-defined past police practices. This record raises three problems that the court's opinion does not adequately address.

First, neither current federal constitutional law nor our prior decisions support the validity of a roadblock absent some minimal overall showing that the police officer's discretion in the field was effectively limited. The court's opinion seeks indirect support from the United States Supreme Court's recent decision in Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990), but, in this regard, that decision offers no such confirmation. Although Sitz certainly upheld the constitutionality of a sobriety checkpoint, the Court did not depart from the basic tenet that such stops be conducted in conformity with certain pre-established guidelines. Id. at 2487 ("[h]ere, checkpoints are selected pursuant to the guidelines."). 3 Further, our prior

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3. In Sitz, the state police director had appointed a Sobriety Checkpoint Advisory Committee that

consisted of representatives of the police force, state prosecutors, and the academic community. This committee then promulgated guidelines for these sobriety checkpoints "setting forth procedures governing checkpoint operations, site selection, and publicity." Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2483-84. The importance attached to these guidelines by the Court, even in the face of the compelling state interest in the detection of drunk drivers, argues for their increased necessity when the state interest is arguably less overriding. Later in the Sitz decision, when analyzing the effectiveness of the procedures used, the Court held that "Brown [v. Texas] was not meant to transfer from politically accountable officials to the courts the decision as to which

among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Id. at 2487 (emphasis added). It follows from this statement that even the Sitz Court contemplated that the neutral guidelines would be implemented by elected government officials accountable to public sentiment and not by police officers in the field.

decisions dealing with roadblocks have never presented us with a case that disclosed such a total lack of supervision of a police officer in the field. 4 While it is true that we have never required that

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4. We have previously held that a written policy and supervision were "preferable," but not "essential" to a determination that a roadblock was

constitutionally valid. State v. Cloukey, 486 A.2d at 147. However, in Cloukey, the record revealed some evidence of supervision, both as to the existence of the roadblock and advance approval of its location. See id. at 144. Similarly, in State v. Leighton, 551 A.2d 116 (Me. 1988), the officers conducted the sobriety checkpoint under oral procedures provided by the sheriff's department, and the sheriff directly supervised the operation of the roadblock. Id. at 117 ("[t]he procedure used at this roadblock was in accordance with guidelines established in advance by supervisory personnel"). In State v. McMahon, 557 A.2d 1324 (Me. 1989), the roadblock "followed unwritten procedures established by the Chief of Police and verbally communicated to all involved officers," which included a procedure whereby the first four cars would be

guidelines be written, this court has always required some evidence of a neutral standard, evidence noticeably absent from the present record.

Second, the unfettered discretion exercised by Officer Curtis and the inadequate procedures that actually resulted from that exercise in this case

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directed into a coned-off area and no other cars could be stopped until those four had been checked and waved through. Id. at 1325. In State v. Sherburne, 571 A.2d 1181 (Me. 1990), the roadblock was conducted pursuant to a written directive on highway checkpoints and inspections and was approved by a superior officer. In the instant case, the record fails to disclose how the past police practice regarding roadblocks alluded to by Curtis in any way limited his discretion regarding site location or procedures.

illustrate the wisdom of a policy that requires some minimal pre-established guidelines or supervision for a roadblock. Officer Curtis apparently chose the location of the roadblock at random, without any prior approval from or notification of a supervisor, without any indication that the targeted area was known for an unusual number of safety violations, and without any prior consideration of the potential danger of placing a roadblock on this two-lane road. Curtis failed to mark the area with cones to warn approaching cars of the roadblock or otherwise to set up an area where detained vehicles could be safely parked. The only indication of the roadblock was one police cruisr with flashing lights; from a distance, an approaching driver could reasonably have concluded that the police officer was making a routine one-car traffic stop. Nor was this a fixed, permanent checkpoint, such as those approved to prevent illegal

immigration, that gives the public at large prior notice of its existence. Cf. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). 5 Finally, Curtis testified that

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5. The Court has approved stops at fixed checkpoints because they prevent any unfair surprise to drivers. Similarly, the Sitz Court had before it an appeal from a declaratory judgment, instituted before the sobriety checkpoints at issue had taken place. See Michigan Dep't of State Police v. Sitz, 110 S. Ct. at 2498-99 (1990) (Stevens, J., dissenting). The checkpoints, conducted pursuant to stringent guidelines, had been extensively prepublicized in the media. In fact, the state police welcomed this publicity for its deterrent effect in keeping drunk drivers off the roads. For this reason, the Sitz decision offers little guidance regarding the

when it appeared to him that the traffic had accumulated at the roadblock, he would wave the cars through without an inspection. Although this procedure was presumably used to limit the intrusiveness and inconvenience of the roadblock, no predetermined guideline mandated how many cars could accumulate in line before Curtis waved them through the roadblock. The facts of this case illustrate the practical consequences of this type of unfettered, spontaneous discretion.

Third, the absence of such minimal guidelines or supervision convert the present roadblock into the functional equivalent of a "roving stop." The presence of an explicit, neutral policy or supervision is designed in part to prevent an individual police officer from creating some pretext to stop automobiles without an

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issue of proper notice to drivers in cases dealing with unpublicized roadblocks.

individualized suspicion. While it is true that explicit, neutral guidelines or supervision will not always prevent a pretextual roadblock, without guidelines or supervision such as "subterfuge" remains largely undetectble and the roadblock is virtually impervious to any challenge to its legality. If a single police officer decides the purpose of a roadblock and where to locate and how to conduct it, the subsequent procedures used are tained by the arbitrariness of that initial decision. On the other hand, when there is evidence of explicit, neutral guidelines or supervision, the factors enumerated in Cloukey come into play to measure whether those policies or orders, and the execution of them by the officers in the field, were indeed objectively reasonable. Without any means to determine the objective reasonableness of this roadblock, it is impossible to distinguish this roadblock from the so-called "roving stop," except

that the police officer is in a fixed position while awaiting the target automobile.

In Delaware v. Prouse, 440 U.S. 648 (1979), the Court held that the police officer making a stop must either haVe an independent articulable suspicion or follow a substantial and objective standard or rule, pursuant to "previously specified 'neutral criteria.'" Id. at 661. A roadblock stop, not based on any individualized suspicion, must therefore be conducted pursuant to a previous guideline. The balancing test set out in Brown v. Texas, 443 U.S. 47 (1979), even in light of the Sitz decision, is premised on the "individual's right to personal security free from arbitrary interference by law officers." Pennsylvania v. Mims, 443 U.S. 106, 109 (1977); see also Delaware v. Prouse, 440 U.S. 648, 653-54 (1979) ("[t]he essential purpose in the Fourth Amendment is to impose a standard of 'reasonableness'

upon the discretion by government officials, including law enforcement against, in order 'to safeguard the privacy and security of individuals against arbitrary invasions.'"). Although the level of intrusion experienced by a driver in a capricious roadblock may be less than that experienced in a "roving stop," this fact alone cannot excuse the circumvention of the general principle that a police officer cannot stop an automobile without a reasonable, articulable suspicion or without some previously specified objective criteria governing the reasonableness of that stop. In the instant case, because the determination rgarding the reasonableness of the roadblock was clearly erroneous, Officer Curtis may not take advantage of the unreasonable roadblock to provide a contextual framework for his claim that he had a reasonable, articulable suspicion to believe that Patterson's intent in switching seats with his

passenger was to avoid detection at the roadblock. "When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." Cf. Brown v. Texas, 443 U.S. 47, 52 (1979). Because it is precisely the function of this court to define such limits, I would vacate the judgment.

EXHIBIT B

State v. Orville Patterson, CR-89-1003

Order of Penobscot County Superior Court

On Defendant's Motion to Supress or

Dismiss dated January 22, 1990.

Motion DENIED. Finding: Based upon the evidence presented this court calendar that the officer was conducting a lawful safety check of vehicles on Route 178; and, when he observed the change of drivers in the defendant's vehicle he had probable cause to inquire into why the change and to ask for the driver's license of the other passenger. (Browne, J., Active-Retired)

EXHIBIT C

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be obligated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
APR 29 1991
OFFICE OF THE CLERK

No. 90-1356

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ORVILLE PATTERSON, JR.,
Petitioner

V.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES.....i

OPINION BELOW.....1

STATEMENT OF THE CASE.....1

REASONS WHY THE PETITION SHOULD BE DENIED.....2

I. THE QUESTION PRESENTED IS A MOOT ISSUE ON THE FACTS OF THIS CASE.....3

II. THERE IS NO CONFLICT BETWEEN THE MAINE COURT'S DECISION AND THE DECISIONS OF THIS COURT.....10

CONCLUSION.....17

TABLE OF AUTHORITIES

CASES **PAGE(S)**

Brower v. County of Inyo, 109 S.Ct. 1378 (1989).....9

Brown v. Texas, 443 U.S. 47 (1979).....11,12

California v. Hodari D., No. 89-1632 (U.S. Apr. 23, 1991).....8,10

Delaware v. Prouse, 440 U.S. 648 (1979).....5,11

Hester v. United States, 265 U.S. 57 (1924).....6,7,8

Michigan v. Chesternut, 108 S.Ct. 1975 (1988).....8

Michigan Dept. of State Police v. Sitz, 110 S.Ct. 2481 (1990).....11,12,15

State v. Patterson, 582 A.2d 1204 (Me. 1990).....1-16

CONSTITUTIONAL PROVISION

U.S. Const. amend. IV.....3,4,13

STATUTES AND RULES

29 M.R.S.A. §§ 2292, 2298.....2

OPINION BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Orville Patterson, Jr. is State v. Patterson, 582 A.2d 1204 (Me. 1990). The Order of the Maine Superior Court, dated January 22, 1990, denying Petitioner's motion to suppress or dismiss, is unreported. Both opinions are reproduced in appendices to Petitioner's petition.

STATEMENT OF THE CASE

Petitioner was convicted in this case of operating a motor vehicle at a time when his driver's license had been revoked because he had been found to be an habitual

offender under Maine's motor vehicle statutes. See 29 M.R.S.A. §§ 2292, 2298.

Respondent adopts the statement of facts contained in the decision of the Maine Supreme Judicial Court, State v. Patterson, 582 A.2d 1204, 1206 (Me. 1990).

REASONS WHY THE PETITION SHOULD BE DENIED

The petition should be denied because this is a poor case to address the Question Presented. First, although the petition asks the Supreme Court to strike down the roadblock involved here, the validity of the stop of Petitioner's pickup truck can be resolved without deciding whether the roadblock itself was legal. Second, notwithstanding the assertions of Petitioner, the decision of the Maine Supreme Judicial Court is not in conflict

with the decisions of this Court and was decided correctly.

I. THE QUESTION PRESENTED IS A MOOT ISSUE ON THE FACTS OF THIS CASE.

Petitioner frames the Question Presented in terms of whether the roadblock complied with the fourth amendment. However, the roadblock did not stop Petitioner. Petitioner was stopped because the officer had articulable and reasonable suspicion that Petitioner had been driving without a license or while intoxicated. Hence, any question about the validity of the roadblock is moot.

This position is supported by the facts. Petitioner was still 100 yards away from the roadblock when he switched places with his passenger. This act revealed Petitioner's consciousness of guilt that gave the officer articulable and reasonable

suspicion to stop Petitioner's truck. Indeed, by waiving "several vehicles through the roadblock" specifically to stop Petitioner's truck (Petition at 5), the officer abandoned the roadblock prior to stopping Petitioner. Moreover, the officer's request for Petitioner to show his license was not part of the roadblock procedure but was prompted by the officer's suspicion that Petitioner was driving either without a valid license or while intoxicated.

Hence, the real issue in this case is not whether the roadblock complied with the fourth amendment but whether the stop of Petitioner's pickup truck complied with the fourth amendment. This stop was valid because, as the Maine Supreme Judicial Court recognized (State v. Patterson, 582

A.2d 1204, 1206 (Me. 1990)), it was based on "a reasonable, articulable suspicion of criminal conduct," i.e., that Petitioner "was either intoxicated or under suspension [of his driver's license]." The stop thus conformed with the holding of Delaware v. Prouse, 440 U.S. 648, 663 (1979), that an automobile may be stopped where there is "articulable and reasonable suspicion that a motorist is unlicensed... or that either the vehicle or an occupant is otherwise subject to seizure for violation of law." (Emphasis added).

Since the roadblock was not the basis of the stop, this Court need not address its validity.

Nor is the stop somehow the "fruit of the poisonous tree" of the roadblock. For, upon seeing the roadblock, Petitioner had

several options, one of which was to merely turn around and drive away and thus avoid the roadblock altogether. Another option would have been to simply continue driving and submit to the roadblock, where Petitioner's driver's license would not have been checked. The fact that Petitioner instead switched places with his passenger within sight of the officer, thus giving rise to the officer's articulable and reasonable suspicion, was an independent act at a time when Petitioner had not yet been seized.

This independent choice is no more the "fruit" of the roadblock than was the abandonment of whiskey containers in Hester v. United States, 265 U.S. 57 (1924), the fruit of the agent's hot pursuit in that case. Yet, the Hester Court held that the

abandonment was not a product of the hot pursuit because no seizure of the defendant or his containers had yet occurred. Moreover, "[t]he defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle...." Hester, 265 U.S. at 58, quoted in California v. Hodari D., No. 89-1632, slip op. at 7 (U.S. Apr. 23, 1991) and Brower v. County of Inyo, 109 S.Ct. 1378, 1381-82 (1989).

Likewise, in this case, the stop is not a product of the roadblock because Petitioner's intervening act in switching places with his passenger occurred well before the roadblock, before any seizure

had taken place.[1/] Furthermore, as in Hester, it was Petitioner's own act that disclosed his guilt and thus provided the officer with articulable and reasonable suspicion to stop the truck and ask for Petitioner's driver's license.

[1/]Under California v. Hodari D., No. 89-1632 (U.S. Apr. 23, 1991), and Michigan v. Chesternut, 108 S.Ct. 1975 (1988), a seizure does not occur when a person takes evasive action because of the presence of the police. A seizure occurs only at the point when the police actually stop an individual either by the application of physical force, however slight, or by the individual's submission to the officer's show of authority. Hodari D., No. 89-1632. In this case, the seizure did not occur until after Petitioner's actions had given rise to an articulable and reasonable suspicion to stop him. Hence, the stop is not the fruit of a pre-existing seizure. See Hodari D., No. 89-1632, slip op. at 7 (abandoned cocaine and ensuing arrest were not the fruit of a seizure, where police pursuit did not constitute seizure).

Even though the roadblock may have been in a broad sense the cause of Petitioner's switching places, Petitioner was in fact stopped on the basis of the officer's resulting suspicion, not by the roadblock. And even though Petitioner would have been stopped at the roadblock anyway, the means that terminated the Petitioner's freedom of movement was not the roadblock but the stop based on the officer's suspicion.

This analysis is supported by Brower v. County of Inyo, 109 S.Ct. at 1381, where this Court stated that a

> Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement..., nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement..., but only

> when there is a
> governmental termination
> of freedom of movement
> through means
> intentionally applied.

(Emphasis in original). Here, after observing Petitioner and waiving several vehicles through the roadblock, the officer intended to and did stop Petitioner on the basis of the officer's articulable and reasonable suspicion. There was no seizure of Petitioner - i.e., no application of physical force by the officer and no submission by Petitioner to the officer (Hodari D., No. 89-1632) - until this stop. Hence, there is no need for the Supreme Court to address the validity of the roadblock in this case.

II. THERE IS NO CONFLICT BETWEEN THE MAINE COURT'S DECISION AND THE DECISIONS OF THIS COURT.

Even if the validity of the roadblock were not a moot issue, the petition should

still be denied because there is no conflict between the decision of the Maine Supreme Judicial Court and those of this Court. Indeed, the Maine Supreme Judicial Court specifically cited to Delaware v. Prouse, 440 U.S. 648 (1979), Michigan Dept. of State Police v. Sitz, 110 S.Ct. 2481 (1990), and Brown v. Texas, 443 U.S. 47 (1979), and explicitly followed the three-pronged balancing test of Brown in reaching its result.

Although Petitioner makes much of the fact that the officer's roadblock was not conducted according to guidelines established by "politically accountable officials" (Petition at 12, 20), nothing in Sitz requires that roadblocks be supervised or conducted under guidelines approved by politically accountable officials. All

that Sitz states is that "Brown was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." Sitz, 110 S.Ct. at 2487.

Moreover, in applying the three-pronged Brown test,[2/] the Maine Supreme Judicial

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[2/] The three-pronged Brown test

> involves [1] a weighing of the gravity of the public concerns served by the seizure, [2] the degree to which the seizure advances the public interest, and [3] the severity of the interference with individual liberty.

Patterson, 582 A.2d at 1205 (quoting Brown, 443 U.S. at 50-51).

Court correctly concluded that the roadblock here was reasonable under the fourth amendment. First, the public does have an interest in the enforcement of motor vehicle safety laws to prevent traffic accidents. Second, the roadblock here promoted that interest because the officer's goal "was only to make a visual check of vehicles for safety violations." The officer was not even checking driver's licenses and registrations. Patterson, 582 A.2d at 1206.

And third, the roadblock did not constitute a severe interference with individual liberty. The officer conducted his check during the daytime, during the

early part of a Saturday afternoon in September, on a well-lit flat stretch of road with visibility of 100 to 150 yards in each direction. The officer's safety check took only one and a half to two minutes. The officer checked headlights, plate lights, tires, and inspection and registration stickers. The officer did not request licenses and registrations, except in those instances where the vehicle had an expired sticker. If the officer found a vehicle or safety defect, the officer merely warned the driver of the problem and did not issue a citation. If the line grew to seven or eight vehicles, the officer simply waved all of them through. As the Maine Supreme Judicial Court stated, "We cannot think of a less intrusive and more effective method of checking for all of

these violations at the same time." Patterson, 582 A.2d at 1206.

Finally, this case does not involve the "kind of standardless and unconstrained discretion which is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." Sitz, 110 S.Ct. at 2487 (quoting Prouse, 440 U.S. at 661). The officer here testified that he conducted this exact kind of safety roadblock for the four years he had been with the Maine State Police and that he knew that other state police officers conducted the same type of safety roadblock in other parts of the state. While recognizing that "the historical fact of an established police practice [does not]

always demonstrate its reasonableness," the Maine Supreme Judicial Court could not find that

> the state police policy of allowing individual officers to conduct this sort of minimally intrusive safety check is unreasonable. The known procedure for conducting these checks worked as a limit on Officer Curtis's discretion. In these circumstances the absence of supervisory personnel in the planning of this specific safety check does not render the limited operation [i.e., intrusion] unreasonable.

Patterson, 582 A.2d at 1206.

The crucial point here is that the officer was not exercising unfettered discretion in choosing either the persons to be seized or the extent of the ensuing searches. Instead, the officer was stopping everyone and subjecting all vehicles to a uniform safety check, except when traffic backed up. Given the

reasonableness of the roadblock conducted here, and that the Maine Supreme Judicial Court correctly applied the legal principles set down by this Court in determining the validity of the roadblock, there is no need for the Supreme Court to review this case.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Dated: April 29, 1991

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